in the death penalty context, where uniformity is critical. As this Court has steadfastly maintained, "capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). The AG belittles the role of this Court and the gravity of death penalty jurisprudence in suggesting that a lack of uniformity in such cases can be shrugged off when the conflict is 8 to 1.

Next, the AG's argument that AEDPA renders the *Brecht* question "academic" is meritless because the Ninth Circuit (unlike several other circuit courts) has "squarely held that the *Brecht* standard survived AEDPA." *Inthavong v. Lamarque*, No. 03-57075, 2005 U.S. App. LEXIS 18035, *8-10 (9th Cir. Aug. 23, 2005); *see Picazo v. Alameida*, 366 F.3d 971, 971 (9th Cir. 2004) (order) (*Brecht* standard applies post-*Esparza*). Indeed, the AG's argument is belied by its own decision to seek review on a *Brecht* question in a pre-AEDPA case. *Sanders v. Woodford*, 373 F.3d 1054, 1060 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 1700 (2005).

Having urged this Court to deny review based on trivial and meritless grounds, the AG fails to address the substantive point raised by the petition – *i.e.*, that application of *Brecht* by federal courts in cases where state courts have failed to perform adequate review conflicts with this Court's mandate that death penalty cases require "close appellate scrutiny of the import and effect of invalid aggravating factors." *Stringer v. Black*, 503 U.S. 222, 230 (1992).

IV. Review Is Warranted To Ensure Consistent Application Of The Limitation That The AG Has Advocated In *Sanders* On The Power Of Federal Courts To Engage In Reweighing Following A Finding Of Sentencing Error.

Arguing as petitioner in *Brown v. Sanders*, the AG has asked this Court to limit the role of federal courts in reweighing sentencing considerations on habeas review of state-imposed death sentences. The AG contends in *Sanders* that even if this Court affirms both the Ninth Circuit's characterization of California as a weighing state and its ruling that the California Supreme Court failed to satisfy the requirements of *Chapman* and *Clemons*, it should overturn the Ninth Circuit's decision to vacate Sanders's death sentence. According to the AG, the Ninth Circuit's decision to vacate that sentence was wrong because the "proper

remedy" for federal courts to impose in such circumstances is a remand to state court for further reweighing. *See* Pet. Op. Br. at 32 n.16, *Brown v. Sanders* (No. 04-980) (citing *Richmond v. Lewis*, 506 U.S. 40, 52 (1992)).

The AG's brief in opposition fails to address the contradiction between its insistence in *Sanders* that the Ninth Circuit erred by failing to afford the California Supreme Court a second chance and its willingness here to abide by the Ninth Circuit's reweighing and affirmance of Morales's death penalty (although no state court has even considered whether Morales's sentence should survive invalidation of the torture special circumstance). The AG simply asserts that a different allocation of responsibility for reweighing is appropriate here because in *Morales* "the Ninth Circuit found any error harmless" and reaffirmed the death sentence. Opp. at 26. But this is not an argument from principle; it is merely a statement of preference for whatever rule leads to the affirmance of death sentences.[9]

The AG's position in *Sanders* cannot be reconciled with the Ninth Circuit's action in this case. If state primacy in sentencing matters requires that federal habeas courts defer to state appellate courts in the reweighing of sentencing considerations, that principle must apply across the board. As Morales's petition points out, Pet. at 28-29, the rationale for state primacy in the reweighing process is at least as strong in cases where a federal court determines a death sentence should remain in place as in cases where it determines that the death sentence should be vacated. Indeed, the particular circumstances surrounding Morales's death sentence – including, most notably, the State's reliance on Samuelson's undisputedly false testimony to support the only remaining special circumstance – provide heightened justification for reweighing by a state appellate court, which could consider the demands of state law and policy as well as of the federal Constitution.

CONCLUSION

Certiorari should be granted.

9. The AG also suggests, Opp. at 26, that this case is different from *Sanders* because Morales has not requested review of the manner in which the Ninth Circuit applied *Brecht*. But this could not matter either, since the AG's remand argument in *Sanders* addresses proper resolution of the case if the Ninth Circuit's application of *Brecht* is upheld.

Respectfully submitted,

DAVID A. SENIOR
Counsel of Record
MCBREEN & SENIOR
1880 Century Park East
Los Angeles, CA 90067
(310) 552-5300

JEFFREY P. KEHNE
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4515

WILLIAM A. NORRIS
L. RACHEL HELYAR
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Attorneys for Petitioner